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6 Attorneys for Defendants
SVC-WEST, L.P., SHELL VACATIONS
7 CM CORP., formerly known as SHELL
DEVELOPMENT CORP-SAN FRANCISCO,
8 and JOHN CARTER

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION

12 JAMES GUERIN, an individual,

13 Plaintiff,

14 v.

15 SHELL VACATIONS CLUB, LLC d/b/a
16 SVC-WEST L.P. d/b/a SHELL VACATIONS
CM CORP d/b/a SHELL DEVELOPMENT
17 CORP-SAN FRANCISCO and
JOHN CARTER, an individual,

18 Defendant.
19

CASE NO. C 07-03153 CW

**DEFENDANTS SVC-WEST, L.P.,
SHELL VACATIONS CM CORP., AND
JOHN CARTER'S ANSWER TO
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

JURY TRIAL DEMANDED

Trial Date: January 5, 2009

1 Defendants SVC-West, L.P., SHELL VACATIONS CM CORP., formerly known
2 as SHELL DEVELOPMENT CORP-SAN FRANCISCO, (collectively, "Shell") and
3 JOHN CARTER ("Mr. Carter") hereby answer Plaintiff's First Amended Complaint for Damages
4 filed by Plaintiff James Guerin ("Plaintiff") in the United States District Court, Northern District
5 of California, Oakland Division, Case No. C 07-03153 CW, as follows:

6 **JURISDICTION**

7 1. The allegations contained in paragraph 1 of Plaintiff's First Amended
8 Complaint are legal conclusions and contain no factual allegations requiring admissions or denials
9 by Shell or Mr. Carter.

10 **INTRADISTRICT ASSIGNMENT**

11 2. The allegations contained in paragraph 2 of Plaintiff's First Amended
12 Complaint are legal conclusions and contain no factual allegations requiring admissions or denials
13 by Shell or Mr. Carter. Further, Shell and Mr. Carter deny that any unlawful actions occurred.

14 3. Shell and Mr. Carter are informed and believe and, on that basis, admit that
15 Plaintiff was a resident of the State of California, County of San Francisco or Napa. Shell and
16 Mr. Carter admit that the employment relationship between them and Plaintiff was "made in and
17 to be performed in" San Francisco and Napa. Shell admits that Plaintiff was employed by
18 SVC-West, L.P., and Shell Vacations CM Corp., formerly known as Shell Development Corpó
19 San Francisco. Mr. Carter lacks sufficient information regarding whether Plaintiff's employer was
20 SVC-West, L.P., and Shell Vacations CM Corp., and on that basis denies this allegation. Shell
21 and Mr. Carter admit that Plaintiff worked for Shell in Napa, California, and that throughout
22 Plaintiff's employment with Shell, Mr. Carter was Shell's Regional Director of Marketing and
23 Plaintiff's manager. Shell and Mr. Carter deny the remaining allegations in paragraph 3.

24 4. Shell admits that SVC-West, L.P. is a California Limited Partnership and
25 Shell Vacations CM Corp. is an Illinois corporation. Mr. Carter lacks sufficient information
26 regarding the first allegation in this paragraph, and on that basis denies it. Shell and Mr. Carter
27 admit that Mr. Carter worked for Shell in San Francisco and Napa during the relevant time period.

1 5. Shell and Mr. Carter admit that Plaintiff began working for Shell on
2 June 27, 2003. Shell and Mr. Carter deny that Plaintiff suffered any injuries as a result of this
3 employment relationship.

4 6. Shell and Mr. Carter lack sufficient information to admit or deny the
5 allegations in paragraph 6, and on that basis deny them.

6 7. Shell and Mr. Carter lack sufficient information to admit or deny the first
7 two allegations in paragraph 7, and on that basis deny them. The last allegation contained in
8 paragraph 7 is a legal conclusion and contains no factual allegations requiring admissions or
9 denials by Shell or Mr. Carter.

10 8. Shell and Mr. Carter lack sufficient information to admit or deny the
11 allegations in paragraph 8, and therefore deny them. The last allegation contained in paragraph 8
12 is a legal conclusion and contains no factual allegations requiring admissions or denials by Shell
13 or Mr. Carter.

14 **FACTUAL BACKGROUND**

15 9. Shell and Mr. Carter admit that Shell hired Plaintiff on June 27, 2003, and
16 that he was recruited to work for Shell by Scott Hall and Mr. Carter, with whom Plaintiff
17 previously had worked. Shell and Mr. Carter further admit that Plaintiff accepted employment as
18 Shell's OPC-Concierge PM Supervisor. Shell and Mr. Carter lack sufficient information to admit
19 or deny the remaining allegations in paragraph 9 and on that basis deny them.

20 10. Shell and Mr. Carter, on information and belief, admit that Plaintiff is "a
21 Caucasian male," "is a recovering alcoholic and has been for approximately the last eight years,"
22 and is "a gay male." The remaining allegations contained in paragraph 10 are legal conclusions
23 and contain no factual allegations requiring admissions or denials by Shell or Mr. Carter.

24 11. Shell and Mr. Carter, on information and belief, admit that Plaintiff was
25 sober and a recovering alcoholic when he began his employment with Shell. Shell and Mr. Carter
26 deny the remaining allegations in paragraph 11.

27 12. Shell and Mr. Carter admit that Plaintiff initially reported to Scott Hall until
28 September of 2003. Shell and Mr. Carter admit that while under Mr. Hall's supervision during

2003, Plaintiff's performance was very good. Shell and Mr. Carter admit that Plaintiff replaced Mr. Hall as In-House Concierge Manager in September of 2003, when he began reporting directly to Mr. Carter. Shell and Mr. Carter deny the allegation that Plaintiff "increased the profitability of each concierge marketing program . . . and decreased each program's expenses." Shell and Mr. Carter admit that in his position as In-House Concierge Manager, Plaintiff received excellent feedback from Mr. Carter. Shell and Mr. Carter lack sufficient information to admit or deny whether Plaintiff regularly made his commissions as In-House Concierge Manager, and on that basis deny it. As to the last allegation in the paragraph, Shell and Mr. Carter admit only that Mr. Carter promoted Plaintiff to the Napa Director of Marketing position effective January 15, 2006, and that his potential compensation increased at that time.

13. Shell and Mr. Carter deny all of the allegations contained in paragraph 13 except Shell and Mr. Carter are informed and believe and, on that basis, admit that Plaintiff commuted between San Francisco and Napa while working in Napa and assisting his replacement in San Francisco between December of 2005 and April of 2006, and admit that Plaintiff was not responsible for the construction of the hotel in Napa.

14. Shell and Mr. Carter deny the allegations contained in paragraph 14.

15. Shell and Mr. Carter deny the allegations contained in paragraph 15.

16. Shell and Mr. Carter deny the first allegation contained in paragraph 16.

Shell and Mr. Carter lack sufficient information regarding the remaining allegations contained in paragraph 16 and on that basis deny them.

17. Shell and Mr. Carter deny the allegations contained in paragraph 17.

18. Shell and Mr. Carter deny the allegations contained in paragraph 18.

19. Shell and Mr. Carter deny the first and second allegations in paragraph 19.

As to the third allegation, that Plaintiff had health issues, Shell and Mr. Carter lack sufficient information regarding that allegation to admit or deny, and on that basis deny it. Shell and Mr. Carter deny the remaining allegations in paragraph 19.

1 20. Shell and Mr. Carter deny the first allegation in paragraph 20. Shell and
2 Mr. Carter lack sufficient information regarding the second allegation in paragraph 20 to admit or
3 deny, and on that basis deny it. Shell and Mr. Carter admit that Plaintiff resigned on or about
4 June 21, 2006.

5 **FIRST CAUSE OF ACTION**

6 **Against Defendant Shell Vacations¹**

7 21. Shell incorporates by reference its allegations, admissions, and denials as
8 set forth in paragraphs 1 through 20, inclusive.

9 22. Shell lacks sufficient information to admit or deny the first allegation in
10 paragraph 22, and on that basis denies it. The second allegation is a legal conclusion and contains
11 no factual allegations requiring admissions or denials by Shell.

12 23. Shell admits that it is an employer under 42 United States Code section
13 12111(5)(A). The second allegation is a legal conclusion and contains no factual allegations
14 requiring admissions or denials by Shell.

15 24. Shell denies the allegations in paragraph 24.

16 25. Shell denies the allegations in paragraph 25.

17 26. Shell denies the allegations in paragraph 26.

18 27. Shell denies the allegations in paragraph 27.

19 28. Shell denies the allegations in paragraph 28.

20 29. Shell denies the allegations in paragraph 29.

21 30. Shell denies the allegations in paragraph 30.

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27 ¹ Defendant John Carter has not responded to the allegations in paragraphs 21-30 because he is not
28 named as a defendant to this cause of action.

SECOND CAUSE OF ACTION

Against Defendant Shell Vacations²

31. Shell incorporates by reference the allegations, admissions, and denials as set forth in paragraphs 1 through 30, inclusive.

32. Shell denies the allegations in paragraph 32.

33. Shell denies the allegations in paragraph 33.

34. Shell denies the allegations in paragraph 34.

35. Shell denies the allegations in paragraph 35.

36. Shell denies the allegations in paragraph 36.

37. Shell denies the allegations in paragraph 37.

38. Shell denies the allegations in paragraph 38.

39. Shell denies the allegations in paragraph 39.

40. Shell denies the allegations in paragraph 40.

THIRD CAUSE OF ACTION

Against All Defendants

41. Shell incorporates by reference the allegations, admissions, and denials as set forth in paragraphs 1 through 40, inclusive. Mr. Carter incorporates by reference the allegations, admissions, and denials as set forth in paragraphs 1-20, inclusive.

42. Shell and Mr. Carter deny the allegations in paragraph 42.

43. Shell and Mr. Carter deny the allegations in paragraph 43.

44. Shell and Mr. Carter deny the allegations in paragraph 44.

45. Shell and Mr. Carter deny the allegations in paragraph 45.

46. Shell and Mr. Carter deny the allegations in paragraph 46.

47. Shell and Mr. Carter deny the allegations in paragraph 47.

48. Shell and Mr. Carter deny the allegations in paragraph 48.

² Defendant John Carter has not responded to the allegations in paragraphs 31-40 because he is not named as a defendant to this cause of action.

1 49. Shell and Mr. Carter deny the allegations in paragraph 49.

2 **FOURTH CAUSE OF ACTION**

3 **Against Defendant Shell Vacations³**

4 50. Shell incorporates by reference the allegations, admissions, and denials as
5 set forth in paragraphs 1 through 49, inclusive.

6 51. Shell admits that it is an employer under California Government Code
7 section 12900 *et. seq.* The second allegation in paragraph 51 is a legal conclusion and contains
8 no factual allegations requiring admissions or denials by Shell. Shell lacks sufficient information
9 regarding the last allegation in paragraph 51 to admit or deny, and on that basis denies it.

10 52. Shell, on information and belief, admits the first allegation in paragraph 52.
11 Shell admits the second allegation in paragraph 52. Shell denies the remaining allegations in
12 paragraph 52.

13 53. Shell lacks sufficient information to admit or deny that Plaintiff "could and
14 did perform the essential functions of his Director of Marketing position," and on that basis denies
15 it. Shell denies the remaining allegations in paragraph 53.

16 54. Shell denies the allegations in paragraph 54.

17 55. Shell denies the allegations in paragraph 55.

18 56. The allegations in paragraph 56 are legal conclusions and contain no factual
19 allegations requiring admissions or denials by Shell.

20 57. Shell denies the allegations in paragraph 57.

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27 ³ Defendant John Carter has not responded to the allegations in paragraphs 50-57 because he is not
28 named as a defendant to this cause of action.

FIFTH CAUSE OF ACTION

Against Defendant Shell Vacations⁴

58. Shell incorporates by reference the allegations, admissions, and denials as set forth in paragraphs 1 through 57, inclusive.

59. Shell lacks sufficient information to admit or deny the first allegation in paragraph 59, and on that basis denies it. The remaining allegations in paragraph 59 are legal conclusions and contain no factual allegations requiring admissions or denials by Shell.

60. Shell admits the first allegation in paragraph 60. The second allegation is a legal conclusion and contains no factual allegations requiring admissions or denials by Shell.

61. Shell denies the allegations in paragraph 61.

62. Shell denies the allegations in paragraph 62.

63. Shell denies the allegations in paragraph 63.

64. Shell denies the allegations in paragraph 64.

65. Shell denies the allegations in paragraph 65.

66. Shell denies the allegations in paragraph 66.

SIXTH CAUSE OF ACTION

Against All Defendants

67. Shell incorporates by reference the allegations, admissions, and denials as set forth in paragraphs 1 through 66, inclusive. Mr. Carter incorporates by reference the allegations, admissions, and denials as set forth in paragraphs 1-20 and 41-49, inclusive.

68. Shell and Mr. Carter deny the allegations in paragraph 68.

69. Shell and Mr. Carter deny the allegations in paragraph 69.

70. Shell and Mr. Carter deny the allegations in paragraph 70.

71. Shell and Mr. Carter deny the allegations in paragraph 71.

72. Shell and Mr. Carter deny the allegations in paragraph 72.

⁴ Defendant John Carter has not responded to the allegations in paragraphs 58-66 because he is not named as a defendant to this cause of action.

1 73. Shell and Mr. Carter deny the allegations in paragraph 73.

2 74. Shell and Mr. Carter deny the allegations in paragraph 74.

3 **SEVENTH CAUSE OF ACTION**

4 **Against Defendant Shell Vacations⁵**

5 75. Shell incorporates by reference the allegations, admissions, and denials as
6 set forth in paragraphs 1 through 74, inclusive.

7 76. Shell lacks sufficient information to admit or deny the first allegation in
8 paragraph 76, and on that basis denies it. The second allegation is a legal conclusion and contains
9 no factual allegations requiring admissions or denials by Shell.

10 77. Shell admits that it is an employer within the meaning of 29 United States
11 Code section 2611(4). The second part of the allegation is a legal conclusion and contains no
12 factual allegations requiring admissions or denials by Shell.

13 78. Shell denies the allegations in paragraph 78.

14 79. Shell denies the allegations in paragraph 79.

15 80. Shell denies the allegations in paragraph 80.

16 81. Shell denies the allegations in paragraph 81.

17 82. Shell denies the allegations in paragraph 82.

18 **EIGHTH CAUSE OF ACTION**

19 **Against Defendant Shell Vacations⁶**

20 83. Shell incorporate by reference the allegations, admissions, and denials as set
21 forth in paragraphs 1 through 82, inclusive.

22 84. Shell lacks sufficient information regarding whether Plaintiff is an
23 employee covered by California Government Code section 12945.2, and on that basis denies it.

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25 ⁵ Defendant John Carter has not responded to the allegations in paragraphs 75-82 because he is not
26 named as a defendant to this cause of action.

27 ⁶ Defendant John Carter has not responded to the allegations in paragraphs 83-90 because he is not
28 named as a defendant to this cause of action.

1 The last part of the allegation is a legal conclusion and contains no factual allegations requiring
2 admissions or denials by Shell.

3 85. Shell admits that it is an employer within the meaning of California
4 Government Code section 12945.2. The last part of the allegation is a legal conclusion and
5 contains no factual allegations requiring admissions or denials by Shell.

6 86. Shell denies the allegations in paragraph 86.

7 87. Shell denies the allegations in paragraph 87.

8 88. Shell denies the allegations in paragraph 88.

9 89. Shell denies the allegations in paragraph 89.

10 90. Shell denies the allegations in paragraph 90.

11 **NINTH CAUSE OF ACTION**

12 **Against Defendant Shell Vacations⁷**

13 91. Shell incorporates by reference the allegations, admissions, and denials as
14 set forth in paragraphs 1 through 90, inclusive.

15 92. Shell denies the allegations in paragraph 92, except that it lacks sufficient
16 information to admit or deny the allegation by Plaintiff that his doctor advised him regarding his
17 medical condition, and on that basis denies it.

18 93. Shell denies the allegations in paragraph 93.

19 94. Shell denies the allegations in paragraph 94.

20 95. Shell denies the allegations in paragraph 95.

21 96. Shell denies the allegations in paragraph 96.

22 97. Shell denies the allegations in paragraph 97.

23 98. Shell denies the allegations in paragraph 98.

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27 ⁷ Defendant John Carter has not responded to the allegations in paragraphs 91-98 because he is not
28 named as a defendant to this cause of action.

TENTH CAUSE OF ACTION

Against All Defendants

99. Shell incorporates by reference the allegations, admissions, and denials as set forth in paragraphs 1 through 98, inclusive. Mr. Carter incorporates by reference the allegations, admissions, and denials as set forth in paragraphs 1-20, 41-49, and 67-74, inclusive.

100. Shell and Mr. Carter deny the allegations in paragraph 100.

101. Shell and Mr. Carter deny the allegations in paragraph 101.

102. Shell and Mr. Carter deny the allegations in paragraph 102.

103. Shell and Mr. Carter deny the allegations in paragraph 103.

104. Shell and Mr. Carter deny the allegations in paragraph 104.

ELEVENTH CAUSE OF ACTION

Against All Defendants

105. Shell incorporates by reference the allegations, admissions, and denials as set forth in paragraphs 1 through 104, inclusive. Mr. Carter incorporates by reference the allegations, admissions, and denials as set forth in paragraphs 1-20, 41-49, 67-74, and 99-104, inclusive.

106. The allegations in paragraph 106 are legal conclusions and contain no factual allegations requiring admissions or denials by Shell or Mr. Carter.

107. Shell and Mr. Carter deny the allegations in paragraph 107.

108. Shell and Mr. Carter deny the allegations in paragraph 108.

109. Shell and Mr. Carter deny the allegations in paragraph 109.

110. Shell and Mr. Carter deny the allegations in paragraph 110.

111. Shell and Mr. Carter deny the allegations in paragraph 111.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(To All Causes of Action – Failure to State a Claim)

1. The First Amended Complaint and each of the purported causes of action therein fail to state facts sufficient to constitute any cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(To All Causes of Action – Statutes of Limitation)

2. Plaintiff's claims are barred, in whole or in part, by applicable statutes of limitation.

THIRD AFFIRMATIVE DEFENSE

(To All Causes of Action – Unclean Hands, Laches, Estoppel, and Waiver)

3. Plaintiff's claims are barred by the doctrines of unclean hands, laches, estoppel, and/or waiver.

FOURTH AFFIRMATIVE DEFENSE

(To All Causes of Action – Lack of Knowledge)

4. Shell and Mr. Carter assert that they had no knowledge of any alleged discrimination, harassment, or other claims alleged by Plaintiff.

FIFTH AFFIRMATIVE DEFENSE

(To All Causes of Action - Damages)

5. Plaintiff has not suffered any damages as a result of any actions taken by Shell or Mr. Carter or their agents or representatives, and Plaintiff is thus barred from asserting any cause of action against Shell or Mr. Carter.

SIXTH AFFIRMATIVE DEFENSE

(To All Causes of Action – Conformity with Existing Law)

6. Shell and Mr. Carter's actions and practices, alleged or actual, were in conformity with common and statutory law, governmental regulations, and industry standards existing at all times alleged in the First Amended Complaint.

SEVENTH AFFIRMATIVE DEFENSE

(To All Causes of Action – Performance of Duties)

7. Plaintiff's First Amended Complaint is barred, in whole or in part, because Shell and Mr. Carter have fully performed any and all statutory and other duties owed to Plaintiff, and therefore, Plaintiff is estopped to assert any causes of action against them.

EIGHTH AFFIRMATIVE DEFENSE

(To All Causes of Action – At-Will Employment)

8. Plaintiff's First Amended Complaint is barred in whole or in part on the grounds that at all times while employed by Shell, Plaintiff was an at-will employee.

NINTH AFFIRMATIVE DEFENSE

(To All Causes of Action – Consent)

9. The alleged causes of action are barred, in whole or in part, because of Plaintiff's ratification, agreement, acquiescence or consent to Shell and Mr. Carter's alleged conduct.

TENTH AFFIRMATIVE DEFENSE

(Causes of Action 1 Through 6 – Failure to Exhaust Administrative Remedies)

10. Plaintiff's claims arising under the Fair Employment and Housing Act, California Government Code section 12940 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 United States Code section 12101 *et seq.*, are barred in whole or in part because he failed to exhaust his administrative remedies.

ELEVENTH AFFIRMATIVE DEFENSE

(Causes of Action 1 Through 5, 9 – No Disability Under the Law)

11. Plaintiff's claims of disability discrimination and/or failure to provide reasonable accommodation are barred in whole or in part because Plaintiff does not have a physical or mental disability as defined by California Government Code section 12926 *et seq.*, or the ADA, 42 United States Code section 12101 *et seq.*

TWELFTH AFFIRMATIVE DEFENSE

(Causes of Action 1 Through 5, 9 – Failure to Request Reasonable Accommodation)

12. Plaintiff's claims of disability discrimination, failure to provide reasonable accommodation, and/or constructive termination are barred to the extent Plaintiff failed to request a reasonable accommodation and/or initiate or participate in a meaningful exchange of ideas regarding the need for or availability of reasonable accommodations.

THIRTEENTH AFFIRMATIVE DEFENSE

(Causes of Action 1 Through 5, 9 – Unreasonable Accommodations)

13. Plaintiff's claims of disability discrimination, failure to provide reasonable accommodation and/or constructive termination are barred to the extent that some or all of Plaintiff's requested accommodations were unreasonable.

FOURTEENTH AFFIRMATIVE DEFENSE

(Causes of Action 1 Through 5, 9 – Inability to Perform with Reasonable Accommodation)

14. Plaintiff's claims are barred because he was unable to perform essential job duties with or without reasonable accommodation.

FIFTEENTH AFFIRMATIVE DEFENSE

(Causes of Action 1 Through 5, 9 – Undue Hardship)

15. Plaintiff's claims are barred because accommodating Plaintiff's alleged disabilities was not reasonable and would have caused an undue hardship to Shell's operations.

SIXTEENTH AFFIRMATIVE DEFENSE

(Causes of Action 1 Through 5, 9 – Interactive Process)

16. Plaintiff's claims are barred on the grounds that Shell could not engage with Plaintiff in the interactive process to the extent Plaintiff failed to request a reasonable accommodation and/or initiate or participate in a meaningful exchange of ideas regarding the need for or availability of reasonable accommodations.

SEVENTEENTH AFFIRMATIVE DEFENSE

**(As to All Causes of Action – No Authorization or Ratification of
Alleged Wrongful Conduct)**

17. Shell and Mr. Carter affirmatively allege that any alleged wrongful conduct toward Plaintiff was not authorized, ratified or approved by them.

EIGHTEENTH AFFIRMATIVE DEFENSE

(As to All Causes of Action – Not "Unlawful")

18. Plaintiff's claims are barred, in whole or in part, because Shell and Mr. Carter's business or employment practices are not, and were not, "unlawful."

NINETEENTH AFFIRMATIVE DEFENSE

(As to All Causes of Action – Reasonable Care)

19. Shell and Mr. Carter exercised reasonable care to prevent and correct harassment or other discrimination, if any.

TWENTIETH AFFIRMATIVE DEFENSE

**(As to Causes of Action 1, 3, 6 and 9 Through 11 – Failure to Take Advantage
of Preventive or Corrective Opportunities)**

20. Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by Shell and Mr. Carter to avoid the alleged harm, if any.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(As to All Causes of Action – Cal. Labor Code § 3600)

21. As this action arises from an employment relationship, any emotional distress or mental anguish allegedly suffered is barred by the exclusive remedy provided by California Labor Code section 3600, *et seq.*, and cannot be compensated for in this present action.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(As to All Causes of Action – Cal. Labor Code § 3200/Set Off)

22. As this action arises from an employment relationship, Plaintiff's claims for mental or emotional distress are subject to the exclusive jurisdiction of the California Workers' Compensation Appeals Board (Labor Code section 3200, *et seq.*). Shell and Mr. Carter also are entitled to a set-off of any recovery Plaintiff may receive and/or could have received from a Workers' Compensation action.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(As to Causes of Action 10 and 11 – No Extreme and Outrageous Conduct)

23. Plaintiff's claims for intentional and negligent infliction of emotional distress are barred because Shell and Mr. Carter's alleged conduct was not extreme and outrageous, and any actions taken were for legitimate business reasons.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(As to Causes of Action 10 and 11 – Concurrent or Alternate Causes of Emotional Distress)

24. To the extent Plaintiff suffered any symptoms of mental or emotional distress or injury, they were the result of a pre-existing psychological disorder or of alternate concurrent causes, and not the result of Shell and Mr. Carter's alleged conduct.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(As to All Causes of Action – Failure to Mitigate)

25. Plaintiff's failure to mitigate his alleged damages bars Plaintiff from recovery in this action, in whole or in part.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(As to All Causes of Action – Punitive Damages)

26. The First Amended Complaint, including each cause of action alleged therein, fails to state facts sufficient to justify an award of punitive damages in that the First Amended Complaint, including each cause of action alleged therein, fails to state sufficient and specific facts to support the underlying allegations of malice, oppression, and fraud.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(As to All Causes of Action – Absence of Malice)

27. Shell and Mr. Carter, and their employees and agents, acted without malice at all times.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(As to All Causes of Action – Protection from Excessive Fines)

28. Plaintiff's First Amended Complaint, to the extent it seeks punitive or exemplary damages, violates Shell's rights to protection from "excessive fines" as provided in the Eighth Amendment of the United States Constitution and in Article I, section 17, of the Constitution of the State of California, and violates Shell's rights to substantive due process as provided in the Fifth and Fourteenth Amendments of the United States Constitution and in the California Constitution and therefore fails to state a claim upon which punitive or exemplary damages may be awarded.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(As to All Causes of Action – Attorneys' Fees)

29. Plaintiff's action is without merit, and pursuant to California Government Code section 12965(b) and California Labor Code section 218.5, Shell and Mr. Carter are entitled to recover their attorneys' fees incurred in defending this action.

THIRTIETH AFFIRMATIVE DEFENSE

(As to Cause of Action 7 – Actions Not Willful)

30. Plaintiff's claims are barred because Shell's actions were not willful within the meaning of United States Code section 2617.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(As to Causes of Action 7 and 8 – Good Faith Action)

31. Plaintiff's claims are barred because Shell acted in good faith and with reasonable grounds that its actions were lawful within the meaning of 29 United States Code section 2617 and/or California Government Code section 12945.1 *et seq.*

THIRTY-SECOND AFFIRMATIVE DEFENSE

(As to All Causes of Action – Comparative Fault)

32. Any damages sustained by Plaintiff were either wholly or in part negligently caused by Plaintiff's own actions, inactions, or delay in acting, and said negligence comparatively reduces the percentage of negligence, if any, by Shell and Mr. Carter

THIRTY-THIRD AFFIRMATIVE DEFENSE

(As to All Causes of Action – Contributory Negligence)

33. Plaintiff was careless and negligent with respect to the matters alleged in the First Amended Complaint, and such carelessness and negligence proximately caused or contributed to the happening of the events alleged in the First Amended Complaint and the loss and damage complained of, if any.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(As to All Causes of Action – Reservation of Defenses)

34. Because the First Amended Complaint is couched in conclusory terms, Shell and Mr. Carter cannot anticipate all defenses which may be applicable to this action. Accordingly, the right to assert additional defenses, if and to the extent such defenses are applicable, is hereby reserved.

WHEREFORE, Shell and Mr. Carter pray as follows:

1. That Plaintiff takes nothing by way of the First Amended Complaint and that judgment be entered in favor of Shell and Mr. Carter;
2. That the First Amended Complaint be dismissed with prejudice;
3. That Shell and Mr. Carter be awarded their costs of suit, including reasonable attorneys' fees; and,

1 4. For such other relief as the Court deems just and proper.

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3 Dated: December 14, 2007

VILLARREAL HUTNER PC

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5 By /s/ DANIELLE L. PENER
6 LARA VILLARREAL HUTNER, ESQ.
7 DANIELLE L. PENER, ESQ.

8 Attorneys for Defendants
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12 and JOHN CARTER
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